

³ The Board notes that, following the October 21, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$12,223.48, for which he was without fault, because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period May 1, 2019 through February 29, 2020, without an appropriate offset; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$500.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On June 4, 2018 appellant, then a 61-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that on May 31, 2018 he pulled his right hamstring when climbing out of a truck while in the performance of duty. He stopped work on June 6, 2018 and did not return. Appellant underwent OWCP-authorized surgical arthroscopy of the right knee with partial medial meniscectomy on September 14, 2018. On January 23, 2019 OWCP accepted the claim for complex tear of the medial meniscus of the right knee. It later expanded the acceptance of the claim to include permanent aggravation of right knee arthritis. OWCP paid appellant wage-loss compensation benefits on the supplemental rolls from January 26 through March 30, 2019 and on the periodic rolls, commencing March 31, 2019.

On February 7, 2020 OWCP provided SSA with a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form.

On March 4, 2020 SSA completed the dual benefits calculation form, which listed appellant's SSA benefit rates with a FERS offset and without a FERS offset. Beginning May 2019, the SSA rate with FERS was \$1,812.00 and without FERS was \$602.00. Beginning December 2019, the SSA rate with FERS was \$1,840.00 and without FERS was \$611.00.

On March 13, 2020 OWCP prepared a FERS offset calculation worksheet wherein it noted the calculation of appellant's SSA offset overpayment from May 1, 2019 through February 29, 2020. The total overpayment was determined to be \$12,223.48. OWCP found that appellant received an overpayment in the amount of \$8,536.48 for the period May 1 through November 30, 2019 and an overpayment in the amount of \$3,687.00 for the period December 1, 2019 through February 29, 2020.

In a letter dated March 16, 2020, OWCP notified appellant that, based on the information provided by SSA regarding the amount of his age-related retirement benefits, which were attributable to Federal service, his FECA wage-loss compensation had been adjusted. After the SSA offset, appellant was to receive net FECA wage-loss compensation of \$2,355.39.

On March 24, 2020 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$12,223.48 had been created, for the period May 1, 2019 through February 29, 2020, because appellant's SSA age-related retirement benefits were partially based on credits earned while working for the federal government, and that this portion of his SSA benefits constituted a prohibited dual benefit. It found him without fault in the creation of the overpayment and provided him with an overpayment action request form and an

overpayment recovery questionnaire (Form OWCP-20) for his completion. OWCP requested that appellant provide supporting financial documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support his reported income and expenses. It notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoument hearing. No response was received.

By decision dated April 28, 2020, OWCP finalized its preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$12,223.48, for the period May 1, 2019 through February 29, 2020, because it had failed to offset his compensation payments by the portion of his SSA age-related retirement benefits that were attributable to Federal service. It further found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record was insufficient to establish that recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience. OWCP required recovery of the overpayment by deducting \$609.45 every 28 days from appellant's continuing compensation payments.

OWCP subsequently received appellant's overpayment action request dated April 20, 2020, wherein appellant requested a prerecoument hearing regarding possible waiver of recovery of the overpayment. In an accompanying Form OWCP-20, he reported that he had total monthly income of \$8,643.00, including his spouse's income of \$4,000.00, SSA benefits of \$1,840.00, workers' compensation benefits of \$2,437.78, and other benefits of \$365.22. Appellant listed monthly expenses totaling \$7,456.00. He listed his monthly expenses as \$1,985.00 for mortgage, \$85.00 for gas, \$149.00 for electricity, \$550.00 for automobile loan, \$200.00 for automobile gas, \$280.00 for automobile insurance, \$150.00 for tolls, \$200.00 for cell phone, \$231.00 for cable, telephone and internet, \$170.00 for water, \$300.00 for storage, \$49.00 for health insurance, \$500.00 for food, \$100.00 for clothes, \$130.00 for hospital payment, \$1,600.00 for credit card payments, and \$777.00 for a personal loan. Appellant noted that he had \$694.00 in a checking account. He indicated that he would be retiring on May 1, 2020 and would therefore be making \$1,964.00 before deductions in retirement. Appellant attached an SSA notice of award letter, which showed that he received monthly benefits in the amount of \$1,812.00, beginning May 2019.

In a June 5, 2020 election of benefits form, appellant elected to receive Civil Service Retirement System (CSRS) or FERS benefits in preference to any benefits to which he may have been entitled to under FECA.⁴

OWCP subsequently received another overpayment action request form, dated May 20, 2020, in which appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. In an accompanying Form OWCP-20, appellant again reported that he had total monthly income of \$8,643.00. He noted that he had available funds of \$676.75 as of May 20, 2020.

OWCP subsequently received a Form OWCP-20, dated September 30, 2020, in which appellant reported that he had total monthly income of \$8,979.73, including his spouse's income

⁴ Appellant, through counsel, appealed OWCP's April 28, 2020 decision to the Board. By order dated July 31, 2020, the Board dismissed appellant's appeal at counsel's request. *Order Dismissing Appeal*, Docket No. 20-1244 (issued July 31, 2020).

of \$5,128.51, SSA benefits of \$1,840.00, Supplemental Security Income of \$1,646.00, and other benefits of \$365.22. Appellant listed total monthly expenses totaling \$7,585.16. He noted monthly expenses of \$1,995.00 for rent or mortgage, \$500.00 for food, \$100.00 for clothing, \$1,740.00 for utilities, \$873.00 for other expenses, \$777.16 for a personal loan, and \$1,600.00 for credit card expenses. Appellant indicated that he had available funds of \$1,545.47 as of September 30, 2020. He reported that he had total debts of \$71,510.93. Appellant attached a benefit statement showing that he received \$609.45 in net compensation for the period April 26 through May 23, 2020.

By decision dated October 21, 2020, OWCP's hearing representative finalized the March 24, 2020 preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$12,223.48 for the period May 1, 2019 through February 29, 2020, because OWCP had failed to offset his compensation by the portion of his SSA age-related retirement benefits that was attributable to his Federal service. It further found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record was insufficient to establish that recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience. OWCP required recovery of the overpayment by deducting \$500.00 every 28 days from appellant's continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.⁵ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁶

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's Federal service.⁷ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA age-related retirement benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$12,223.48, for which he was without fault, because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period May 1, 2019 through February 29, 2020, without an appropriate offset.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d); *see J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.W.*, Docket No. 19-0787 (issued October 23, 2019).

⁸ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also S.M.*, Docket No. 20-0152 (issued August 10, 2020).

The evidence of record indicates that, while appellant was receiving FECA wage-loss compensation benefits, he was also receiving SSA age-related retirement benefits attributable to his federal service. As noted, a claimant cannot receive both compensation for wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to federal service for the same period without an appropriate offset.⁹ The information provided by SSA establishes that appellant received SSA age-related retirement benefits that were attributable to his federal service during the period May 1, 2019 through February 29, 2020. Consequently, the fact of the overpayment has been established.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided its rate with FERS and without FERS for specific periods commencing May 1, 2019 through February 29, 2020. OWCP provided its overpayment calculations for each relevant period based on the SSA worksheet and in its March 24, 2020 preliminary overpayment determination.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period May 1, 2019 through February 29, 2020 and finds that an overpayment of compensation in the amount of \$12,223.48 was created.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."¹¹

Recovery of an overpayment will defeat the purpose of FECA when such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.¹² An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹³ Also, assets must

⁹ See *I.U.*, Docket No. 20-0129 (issued July 31, 2020).

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8129(b).

¹² 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020). OWCP's procedures further provide that assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent, plus \$1,200.00 for each additional dependent. *Id.* at Chapter 6.400.4a(2).

¹³ *Id.* at Chapter 6.400.4a(3); *C.B.*, Docket No. 20-0031 (issued July 27, 2020); *N.J.*, Docket No. 19-1170 (issued January 10, 2020).

not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent.¹⁴ An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.¹⁵

Recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁶

OWCP regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver of recovery of the overpayment must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁸ However, appellant had the responsibility to provide financial information to OWCP,¹⁹ but failed to do so.

In its preliminary overpayment determination, dated March 24, 2020, OWCP requested that appellant provide a completed Form OWCP-20 and supporting financial documentation, including copies of income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support income and expenses. It advised him that it would deny waiver of recovery if he failed to furnish the requested financial information within 30 days. While appellant provided the requested Form OWCP-20, he did not submit any financial information necessary for OWCP to determine if recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

¹⁴ See *supra* note 122 at Chapter 6.400.4a(2) (September 2020).

¹⁵ *Supra* note 12 at Chapter 6.400.4b(3).

¹⁶ 20 C.F.R. § 10.437(a)(b).

¹⁷ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

¹⁸ *Id.* at § 10.436.

¹⁹ *Id.* at § 10.438; *S.P.*, Docket No. 19-1318 (issued July 31, 2020).

Accordingly, as appellant did not submit the information required under 20 C.F.R. § 10.438 of OWCP's regulations to determine his eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.²⁰

Section 10.441 of OWCP's regulations²¹ provides that, when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.²²

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$500.00 every 28 days from appellant's continuing compensation payments.

OWCP provided appellant a Form OWCP-20 with its March 24, 2020 preliminary overpayment determination. Appellant, however, did not provide sufficient financial information and supporting documentation to support his income and expenses prior to the final October 21, 2020 overpayment decision. When an individual fails to provide sufficient financial information with supporting documentation, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.²³ As such, the Board finds that OWCP properly required recovery of the \$12,223.48 overpayment at the rate of \$500.00 every 28 days from his continuing compensation payments.²⁴

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$12,223.48, for which he was without fault, because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits for the period May 1, 2019 through February 29, 2020, without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and

²⁰ *Id.* at § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

²¹ *Id.* at § 10.441(a).

²² *Id.*; *see L.G.*, Docket No. 19-1274 (issued July 10, 2020).

²³ *See J.A.*, Docket No. 19-1946 (issued July 13, 2020); *Frederick Arters*, 53 ECAB 397 (2002); *supra* note 122 at Chapter 6.500.2 (September 2020).

²⁴ *See J.A.*, *id.*; *E.K.*, Docket No. 18-0587 (issued October 1, 2018); *S.B.*, Docket No. 16-1795 (issued March 2, 2017).

properly required recovery of the overpayment by deducting \$500.00 from his continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the October 21, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 13, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board